JUN 26 1975

PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1642

ANONYMOUS J. and ANONYMOUS R., Attorneys Admitted to Practice in the State of New York,
Petitioners,

v.

THE BAR ASSOCIATION OF ERIE COUNTY and JOHN B. WALSH, General Counsel to the General Preliminary Investigation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE BAR ASSOCIATION OF ERIE COUNTY and
JOHN B. WALSH, General Counsel to the
General Preliminary Investigation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on the 3rd day of April, 1975.

Citations to Opinions Below

The opinion of the District Court is unreported and is printed in Appendix B hereto, *infra*, p. 17. The opinion of the Court of Appeals is unreported and is printed in Appendix B hereto, *infra*, p. 13.

Jurisdiction

The judgment of the Court of Appeals was entered on April 3, 1975, printed in Appendix B hereto, p. 13. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

Where a local bar association disciplinary action is commenced solely on the basis of the immunized testimony of the attorney-respondents therein, is federal relief available to enjoin the proceeding?

Where the Courts of the State of New York have consistently refused to recognize the rights of attorneys, under the Fifth and Fourteenth Amendments of the United States Constitution, in bar association disciplinary proceedings, should the federal courts intervene to prevent those abuses?

Statute Involved

The statutory provision involved is 42 U.S.C. § 1983. It is printed in Appendix A, *infra*, p. 12.

Statement

Petitioners, attorneys admitted to practice in the State of New York, invoked the jurisdiction of the District Court, under 42 U.S.C. § 1983, to enjoin the Respondents from proceeding with disciplinary actions against them on the grounds that said proceedings were violative of the rights enuring to the Petitioners under the Fifth and Fourteenth Amendments to the United States Constitution.

During the summer of 1971, the Erie County District Attorney's Office had commenced a probe which later ripened into a Grand Jury investigation relative to alleged irregularities in the disposition of certain traffic matters in the City Court of Buffalo.

On December 14, 1971, the Petitioners had been called to testify before the Grand Jury and requested to execute formal written waivers of immunity in regard thereto. On the advice of counsel they had declined to do so. When so advised, the Grand Jury voted them full and complete transactional immunity in return for their testimony. At that juncture and with full transactional immunity bestowed upon them, the Petitioners were compelled to give testimony or suffer the consequences of a contempt citation. Without executing a waiver of immunity, the Petitioners were taken before the Grand Jury and testified. A single indictment was returned against one individual and at the trial thereon, the Petitioners having been immunized as indicated, were called as witnesses and gave testimony. Over a year after their trial testimony and two and one-half years after their Grand Jury testimony, both Petitioners were served with a Petition and Notice of Motion instituted by the Respondent, Bar Association of Erie County, naming both of them and seeking to have them disciplined. Petitioner, ANONYMOUS R. was also named

in a separate Petition and Notice of Motion, naming him alone and seeking the same punishment.

In the preparation of the Petitions, the Respondents conducted no investigation, interrogated no witnesses, held no hearings whatsoever but prepared them and the charge therein contained wholly and solely from the immunized trial testimony of Petitioners.

The Petitioners commenced the instant action in the United States District Court, Western District of New York, on July 26, 1974, seeking, *inter alia*, a preliminary injunction and final judgment permanently enjoining the defendants from proceeding with disciplinary proceedings against them.

They also sought final judgment declaring that they may not be subjected to disciplinary proceedings on matters for which they were previously granted full transactional immunity and that their compelled testimony, elicited under grants of immunity, cannot be used against them in any manner whatsoever in such proceedings.

The Petitioners proceeded by an Order to Show Cause, granted on July 29, 1974, to secure the preliminary injunction sought pending the entry of final judgment.

The Respondents filed no Answer but instead moved to dismiss the Complaint and Motion for Preliminary Injunction on the grounds that such Complaint failed to state a claim upon which relief could be granted and, further, that the Court lacked jurisdiction of the subject matter.

The Hon. John T. Curtin, on October 17, 1974, granted the defendants' Motion to dismiss the Complaint, without prejudice. The Court below affirmed the Order of the District Court upon the authority of *Younger v. Harris*, 401 U.S. 37 (1971), and *Erdmann v. Stevens*, 458 F. 2d 1205 (2d Cir. 1972), Cert. Denied, 409 U.S. 889 (1972).

Reasons for Granting the Writ

1. The doctrines enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), upon the authority of which the instant case was decided in the courts below are not applicable to this action and the facts and circumstances of this case differ from those in *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972).

In *Younger*, the court stressed the restraint to be exercised by courts of equity "when the moving party has an adequate remedy at law *and* will not suffer irreparable injury if denied equitable relief." at 43-44. (Emphasis added.)

Assuming an adequate remedy at law is available to the Petitioners through an ultimate appeal to the United States Supreme Court, the injury to be sustained by them, prior thereto, will be great, immediate and irreparable. There is no way to erase from the minds of the public, the disgrace, humiliation and degradation resulting from the notariety attendant to successful bar association disciplinary proceedings.

Contrary to the facts of *Younger v. Harris, supra*, where Harris had an adequate remedy at law and where the denial of injunctive relief would not result in irreparable injury, if these Respondents are allowed to proceed with their disciplinary actions, using the immunized testimony of the Petitioners to sustain the allegations contained in the petitions, the Petitioners herein would suffer great, immediate and irreparable harm, occasioned solely as a result of a deprivation of their constitutional rights—a deprivation routinely and consistently practiced by the State of New York in disciplinary proceedings where Fifth

Amendment privileges are asserted as a defense or bar. The harm and loss to be suffered by the Petitioners, of course, is the immediate and disasterous loss of livelihood and earning ability which would, with more than a reasonable probability, ensue following a determination by the New York State Supreme Court, Appellate Division, Fourth Department, whether that determination be censure, suspension or disbarment. In accordance with New York State Judiciary Law 90, upon a finding of misconduct, the proceedings no longer remain confidential, as they are supposed to be theretofore, but, rather, become a matter of public record, available to all, including, and most notably, the media.

One of the most valuable assets of an attorney is the image he projects to the public. This public opinion is, in large measure, formed as a result of the esteem with which the lawyer is regarded by members of the bench and bar. The public reporting of the imposition of judicial sanctions, in any manner whatsoever, would severely impair the ability of the Petitioners to successfully, and profitably, practice their profession. Furthermore, and even more drastically, should the Appellate Division order suspension or disbarment, the effective date of such a penalty would be almost immediate and, in any event, in advance of any review by the New York State Court of Appeals or the Supreme Court of the United States. During any period of suspension or disbarment, these Petitioners would be completely and absolutely enjoined from practicing law in the Courts of the State of New York, or even clerking in a law office. An eventual reversal of the Appellate Division determination would not restore the plaintiffs to their present position, either financially or in the eyes of the public.

The real threat of this irreparable, great and immediate loss compelled the plaintiffs to commence this action, and, as explained in *Mitchum v. Foster*, 407 U.S. 225 (1972), the purpose for the existence of 42 U.S.C. § 1983, is to prevent such an occurrence.

In *Huffman v. Pursue, Ltd.*, 95 S.Ct. 1200 (1975), cited in the opinion of the court below, the court focused upon the existence of irreparable injury and remanded that case to the District Court, ostensibly for a hearing, for a determination as to whether that injury, if any, fell within an exception to *Younger*.

2. Traditionally, recently and uniformly, the courts of the State of New York have held that compelled testimony given pursuant to grants of transactional immunity and obtained only as a result thereof, are admissible in bar association disciplinary proceedings despite the existence of the Fifth and Fourteenth Amendments of the United States Constitution, and the Federal Court decisions decided thereunder.

See *In Re Epstein*, 325 N.Y.S. 2d 657, 37 A.D. 2d 333 (1971), motion for leave to appeal denied, 327 N.Y.S. 2d 1076 (1971), motion to dismiss appeal granted, 328 N.Y.S. 2d 1031 (1971), cert. denied, 405 U.S. 1046 (1971); *In Re Selig*, 32 A.D. 2d 213, 302 N.Y.S. 2d 95 (1st Dept. 1969); *Zuckerman v. Greason*, 20 N.Y. 2d 430, 285 N.Y.S. 2d 430 (1967); *Matter of Ungar*, 27 A.D. 2d 925, 282 N.Y.S. 2d 158 (1st Dept. 1967), leave to appeal denied, 20 N.Y. 2d 642, 282 N.Y.S. 2d 1026, 229 N.E. 2d 326 (1967), cert. denied 389 U.S. 1007; *Matter of Farrell*, 27 A.D. 2d 61, 276 N.Y.S. 2d 61 (1st Dept. 1966).

This refusal to recognize the privilege against self-incrimination has been based on the established, entrenched, New York decisional law which has held that disciplinary proceedings are "civil", in nature and not *criminal* or *quasi-criminal*. (See also *Zuckerman v. Greason*, 285 N.Y. S. 2d L (1968); *In Re Randell*, 158 N.Y. 216, 52 N.E. 1106 (1899), *In Re Lynch*, 227 App. Div. 471, 238 N.Y.S. 482 (1930), *In Re Rothenberg*, 18 A.D. 2d 397, 239 N.Y.S. 2d 591 (1963), *In Re O'Neill*, 184 App. Div. 75, 171 N.Y.S. 514 (1914), *Feola v. New York State Bar Association*, 37 A.D. 2d 789, 324 N.Y.S. 2d 654 (1971).)

These holdings, that disciplinary proceedings are civil in nature, are contrary to the interpretation of such proceedings by the Federal Courts. See *In Re Ruffalo*, 390 U.S. 544 (1968).

Given the New York State Court's traditional unwillingness to apply the protections of the Fifth and Fourteenth Amendment safeguards for the benefit of attorneys in disciplinary proceedings, a request for such recognition would be futile.

Federal Courts will not, and should not, abstain from exercising jurisdiction where recent State holdings on a question of substantive law demonstrate that relitigation of the same issue would have proven futile. *United States ex rel. Lois Sero, et al. v. Peter Preiser*, 506 F2d 1115 (2d Cir. 1974).

Even *Younger* recognized the uselessness of always requiring resort to State Courts, citing *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that

> "The accused should first set up and rely upon his defense in the State Courts . . . *unless it plainly appears that this course would not afford adequate protection.*" 401 U.S. 371, 91 S.Ct. 745, 750 (1971). (Emphasis added)

The constitutional issue before the Second Circuit in *Erdmann v. Stevens, supra*, was whether the institution of disciplinary proceedings was a violation of his First Amendment rights. The Second Circuit held that New York Courts had the competency to decide these First Amendment questions and recognized that First Amendment rights had always been adequately protected by New York Courts. However, this has not been the case where Fifth and Fourteenth Amendment rights have been involved. As hereinabove discussed, the New York Courts have consistently rejected the contention that the privilege against self-incrimination is available in the context of bar association disciplinary proceedings, and, unlike *Erdmann, supra,* resort to the state courts in the instant case would be futile.

3. Disciplinary proceedings are quasi-criminal, *In Re Ruffalo*, 390 U.S. 544 (1968), and, as such, the transactional immunity which was conferred upon the Petitioners totally insulated and immunized them from any criminal or quasi-criminal proceedings.

The sanctions which may be imposed on attorneys as the result of disciplinary proceedings are of a real significance. These measures constitute punishment, penalty and forfeiture which reflect the quasi-criminal nature of the proceedings in the first instance.

No one can seriously question the fact that censure, suspension from the practice of law or disbarment therefrom constitutes punishment, penalty and forfeiture in a very real sense.

The instant disciplinary proceedings, in general, and the use of the compelled testimony, in particular, are violative of Petitioners' civil rights and prohibited as unconstitutional in violation of the Fifth Amendment protection against self-incrimination made applicable to the states by the Fourteenth Amendment.

In *Kastigar v. United States*, 406 U.S. 441 (1971), the court held that the Constitution permits testimony to be compelled if neither it nor its fruits are available for use, and that the testimony, as elicited, cannot lead to the infliction of criminal penalties.

The Petitioners having been granted full transactional immunity by the State, must be afforded whatever immunity is necessary to supplant this privilege. *Lefkowitz v. Turley*, 94 S.Ct. 316, 325 (1973).

The immunity extended to a witness must be coextensive with all possible governmental penalties and forfeitures, criminal or civil. *Lurie v. Florida State Board of Dentistry*, Fla. 288 So. 2d 223 (1973).

The State of New York, through its authorized officials, in granting the Petitioners immunity, acts totally for the State. The State is now attempting to nullify that immunity by using the Petitioners' immunized testimony in the disciplinary proceedings.

Had the Petitioners refused to testify, after having received a grant of immunity, they would have been incarcerated for their contempt and, most assuredly, would have encountered bar association disciplinary proceedings seeking to punish them for their refusal to testify. On the other hand, having testified, the Respondents have used,

and intend to use, that compelled testimony to prosecute its present disciplinary action. Thus, in either event, if the utilization of their compelled testimony is permitted, the Petitioners would be, as they presently are, confronted with a most serious threat to their livelihoods. (See *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967).)

The institution of the disciplinary proceedings, in general and the use of the compelled testimony, in particular, are thus violative of the Fifth and Fourteenth Amendment rights of these Petitioners.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: June 18, 1975.

Respectfully submitted,

JAMES P. SHEA,
Counsel for Petitioners,
Western Building,
15 Court Street,
Buffalo, N.Y. 14202.

APPENDIX A

Statute Involved

The statutory provision involved is § 1983 of Title 42 of the United States Code.

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX B

Opinions and Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 640, 641—September Term, 1974.

(Argued February 19, 1975 Decided April 3, 1975.)

Docket Nos. 74-2489, 74-2515.

ANONYMOUS J. and ANONYMOUS R., Attorneys
Admitted to Practice in the State of New York,
Plaintiffs-Appellants,

against

THE BAR ASSOCIATION OF ERIE COUNTY and
JOHN B. WALSH, General Counsel to the
General Preliminary Investigation,
Defendants-Respondents.

Before:

ANDERSON, MULLIGAN and VAN GRAAFEILAND,
Circuit Judges.

Appeal from an order of the United States District Court for the Western District of New York, Hon. John T. Curtin, Chief Judge, dismissing a complaint seeking injunctive and declaratory relief against the use of plaintiffs' immunized grand jury testimony by the defendants in disciplinary proceedings pending before the Appellate Division of the New York Supreme Court.

Affirmed.

Philip H. Magner, Jr., Buffalo, New York (Garvey, Magner & Sullivan, Buffalo, New York), for Plaintiff-Appellant J.

Thomas P. Flaherty, Buffalo, New York (Flaherty & Shea, Buffalo, New York), for Plaintiff-Appellant R.

John B. Walsh, Buffalo, New York, for Defendants-Respondents.

PER CURIAM:

Appellants are two attorneys at law admitted to practice in the State of New York. During the summer of 1971, the Erie County District Attorney's Office commenced an investigation into the propriety of the disposition of certain traffic matters in the City Court of Buffalo. Both attorneys were called to testify before the grand jury and both refused to execute written waivers of immunity on the advice of their counsel. The grand jury voted them transactional immunity and both thereupon testified befor the grand jury on May 31, June 1 and June 4, 1973. An indictment was returned against a third person and the appellants testified as witnesses on that trial. On June 11, 1974, the appellants were served with a petition and notice of motion by the defendant Bar Association of Erie County charging them with violations of N. Y. Penal Law §§ 115.00, 100.05 and 105.05, as well as Canons 1, 6, 7, 8 and 9 of the Code of Professional Responsibility. The petitions and motions were returnable on June 25, 1974 before the New York State Appellate Division of the Supreme Court, Fourth Department. On the return date, the matter was adjourned until August 1, 1974. On July 26, 1974, the appellants commenced an action in the United States District Court for the Western District of

New York seeking preliminary and permanent injunctive relief enjoining the defendants from pursuing the disciplinary proceedings. They also sought a declaratory judgment that their immunized grand jury testimony could not be used against them in any way in the pending disciplinary proceedings. Federal jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983. On July 29, 1974, appellants obtained from Hon. John T. Curtin, Chief Judge of the Western District of New York, an order to show cause why a preliminary injunction should not be issued against the defendants. Defendants filed no answer but moved to deny the motion for the preliminary injunction and dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted.

On October 17, 1974, Chief Judge Curtin issued a decision and order granting the defendants' motion to dismiss the complaint. The court below based its decision upon the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) and its application by this court in *Erdmann v. Stevens*, 458 F.2d 1205, cert. denied, 409 U.S. 889 (1972). The court also stated that it was adopting the reasoning of *Anonymous v. Association of the Bar of the City of New York*, 74 Civ. 2398 (S.D.N.Y. July 31, 1974). The appeal in that case was heard by this panel on the same day as this appeal, and our affirmance there (____ F.2d ____ (1975)) compels affirmance here. The factual situation in both cases is the same in all material respects, the only distinction being that here the disciplinary proceeding had progressed from the Bar Association to the Appellate Division by the time this action was commenced.

Appellants here raise substantially the same arguments presented in *Anonymous v. Association of the Bar, supra,* in an effort to avoid the holding by this court in *Erdmann.* Since these contentions are fully discussed in our opinion in the companion case, repetition is unwarranted.

Appellants, however, do raise one issue not raised in *Anonymous.* They urge that since this action is based upon the Civil Rights Act of 1871, 42 U.S.C. § 1983, it is not subject to the restrictions of the anti-injunction statute, 28 U.S.C. § 2283, or the *Younger* abstention principle. There is no doubt but that a section 1983 action falls within the "authorized by Act of Congress" exception to section 2283. *Mitchum v. Foster,* 407 U.S. 225 (1972). However, it is equally clear that section 1983 is not exempted from the *Younger* abstention doctrine. *Erdmann* itself was a case in which plaintiff's counsel invoked section 1983 but we nonetheless refused to intervene in the state action. In any event, in *O'Shea v. Littleton,* 414 U.S. 488, 499 (1974), the Supreme Court applied the *Younger* principle in a 1983 action, reiterating what it had said in *Mitchum v. Foster, supra,* 407 U.S. at 243, that the *Mitchum* holding was not intended to qualify in any way the principles of comity and federalism. See *Huffman v. Pursue, Ltd.,* 43 U.S.L.W. 4379, 4380 n.1 (March 13, 1975) (*Younger* held applicable in a suit brought under 1983 to enjoin a state civil proceeding).

Affirmed.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ANONYMOUS R. and ANONYMOUS J., Attorneys
Admitted to Practice in the State of New York,
Plaintiffs,

vs.

THE BAR ASSOCIATION OF ERIE COUNTY and
JOHN B. WALSH, General Counsel, Office of
General Preliminary Investigation,
Defendants.

Civil 74-364.

Appearances:

Flaherty & Shea (Thomas P. Flaherty, Esq., of Counsel), Buffalo, New York, for Plaintiff R.

Garvey, Magner & Sullivan (Philip H. Magner, Jr., Esq., of Counsel), Buffalo, New York, for Plaintiff J.

John B. Walsh, Esq., Buffalo, New York, for Defendants.

Plaintiffs are attorneys admitted to practice in the State of New York, against whom disciplinary proceedings are pending brought by the Bar Association of Erie County before the New York State Supreme Court, Appellate Division, Fourth Department. Defendants are the Bar Association and John B. Walsh, General Counsel to the Bar Association's Committee on Grievances. Plaintiffs

seek injunctive relief against defendants' using grand jury testimony given by plaintiffs under a grant of immunity in the disciplinary proceedings. Plaintiffs claim that the proposed use of compelled testimony violates their fifth amendment right against self-incrimination, held applicable to the states by the fourteenth amendment. *See Malloy v. Hogan,* 378 U.S. 1 (1964). Federal jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343 and 2201, *et seq.*, and the federal Civil Rights Act, 42 U.S.C. § 1983.

Before the court is plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss the action for failure to state a claim. Plaintiffs' motion is denied. Defendants' motion is granted.

On December 14, 1971, plaintiffs were called to testify before a grand jury investigating certain alleged irregularities in the disposition of certain traffic matters in Buffalo City Court. Plaintiffs declined to execute written waivers of immunity on the advice of counsel. The grand jury then voted them full and complete transactional immunity. Plaintiffs then were taken before the grand jury and testified. Subsequently the grand jury returned one indictment against one individual and, at the trial, plaintiffs were called as witnesses and gave testimony under the grant of immunity. Plaintiffs testified on May 31, June 1 and June 4, 1973 in Erie County Court.

Approximately on June 11, 1974, the defendant Bar Association of Erie County commenced a disciplinary proceeding against plaintiffs, with defendant John B. Walsh acting as its counsel before the New York State Supreme Court, Appellate Division, Fourth Department. In its petition the Bar Association alleged that the plaintiffs

violated the Penal Code of the State of New York and the Code of Professional Responsibility by reasons of actions and conduct described in the testimony of plaintiffs given before the grand jury and trial jury. The defendants' motions and petitions were returnable on June 25, 1974 before the Appellate Division. The return date was adjourned to August 1, 1974, since extended to September 10, 1974.

Defendants did not hold any hearings for the preparation of the petitions. Plaintiffs' allegation (which must be accepted as true at this stage of the proceedings) is that the charge contained in the petitions derived wholly and solely from the immunized trial testimony of plaintiffs.

Plaintiffs' complaint is dismissed for insufficiency, under the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971). The disciplinary proceedings in the instant case were commenced on June 11, 1974. The summons and complaint in the federal action were filed on July 26, 1974. Therefore, the state prosecution was pending so as to make federal intervention inappropriate. *Perez v. Ledesma,* 401 U.S. 82, 103 (1971) (Brennan, J. concurring). Further, the pending state bar disciplinary proceeding is quasi-criminal in nature. *In Re Ruffalo,* 390 U.S. 544, 551 (1968); *Erdmann v. Stevens,* 458 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied,* 409 U.S. 889 (1972). *See also,* Place and Bloom, *Mental Fitness Requirements for the Practice of Law,* 23 Buffalo L. Rev. 579, 595 (1974). As Judge Greisa so ably pointed out, *Erdmann* is still the rule in this Circuit and its holding that federal courts should not intervene in a pending state bar disciplinary proceeding binds this court. *Anonymous v. Assoc. of Bar of City of New York, et al.,* 74

Civ. 2398 (S.D.N.Y. July 31, 1974). This court adopts the reasoning of *Anonymous, supra*.

Defendants' motion to dismiss the complaint is granted, without prejudice.

So ordered.

JOHN T. CURTIN.
United States District Judge.

Dated: October 17, 1974.